

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

* * * * * C.A. NO. 00-105L

EFRAT UNGAR, et al

VS.

APRIL 4, 2008

2:08 P.M.

THE PALESTINIAN LIBERATION
ORGANIZATION, et al

* * * * * PROVIDENCE, RI

BEFORE THE HONORABLE RONALD R. LAGUEUX,

SENIOR JUDGE

(Defendants' Motion to Set Aside Default)

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U.S. DISTRICT COURT
DISTRICT OF RHODE ISLAND

2008 APR 28 A 8:36

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9 Proceeding reported and produced by computer-aided
10 stenography
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1 4 APRIL 2008--2:08 P.M.

2 THE COURT: Good afternoon, everyone.

3 We have here today Naval Officers from some 34 or
4 35 nations who are studying at the Naval War College,
5 studying the American Governmental system, taking a look at
6 the Federal Judicial system. They've traveled all over the
7 country looking at various things, and they are not only
8 studying how to make war, but how to make peace. And so
9 they're observing today, after I've given them a lecture on
10 the American Judicial system, the proceedings here today.

11 The case before the Court is the Estate of
12 Yaron Ungar, et al, vs. The Palestinian Authority, et al.
13 It is Civil Action No. 00-105L. And the matter is here on
14 Defendant's motion for relief from a default judgment
15 entered some three and a half years ago.

16 Will the attorneys identify themselves for the
17 record, please.

18 MR. STRACHMAN: David Strachman for the Plaintiffs.

19 MR. ROCHON: Good afternoon, Your Honor.

20 Mark Rochon on behalf of the Palestinian Authority and the
21 PLO.

22 MR. HIBEY: Good afternoon, Your Honor.

23 Richard Hibey for the Defendants.

24 MR. SHERMAN: Deming Sherman for the Defendants.

25 THE COURT: All right. Who will argue on

1 Defendants' side?

2 MR. ROCHON: I will, Your Honor.

3 THE COURT: All right. Mr. Rochon, you may
4 proceed.

5 MR. ROCHON: Thank you. Good afternoon,
6 Your Honor.

7 As indicated, my name is Mark Rochon. I'm with the
8 law firm Miller & Chevalier in Washington, D.C. The first
9 thing I'd like to do is-- of course I haven't been in front
10 of the Court before, and thank you for granting our
11 admission pro hac vice in this matter so that I can be heard
12 before you today.

13 We are here on Defendants' motion to vacate a
14 default judgment. And, as we've indicated in our papers, I
15 hope we've conveyed to the Court that we do understand the
16 extraordinary nature of the relief we request, the
17 procedural history inflicted on this case by our clients in
18 connection with the entry of the default judgment.

19 And I'm going to proceed this afternoon, if I may,
20 by doing something that is not usually recommended in the
21 oral advocacy handbooks, which is to start with what is
22 apparently perceived to be our weakest arguments, instead of
23 what we believe to be our strongest arguments.

24 Therefore, I will not reach the issues of
25 meritorious defense until I attempt to address some of the

1 other issues that are raised by the Plaintiffs in suggestion
2 that the Court ought not even reach the question of
3 meritorious defenses in this case.

4 And let me start with the fundamental question of
5 whether or not the default here was willful. And let me say
6 to the Court that, after a moment or so, I'll get to what I
7 believe are some nuanced aspects of that question. But,
8 fundamentally, Your Honor, we recognize in our pleadings and
9 before you that it would be within the ambit of your
10 discretion to find that it was a willful default.

11 So I've given that first answer. But I think it is
12 important to note, after saying so, that the Court consider
13 the circumstances as of the time of the default. And the
14 parties agree that the relevant inquiry, the relevant time
15 point for you to make that inquiry, is as of the default,
16 not as to conduct subsequent to the default. In Footnote 2
17 of the Plaintiffs' objection to our motion, they note that,
18 that is the relevant time frame for you to make that
19 inquiry.

20 When the default-- and I distinguish between the
21 default and the default judgment-- when the default was
22 entered, it was entered-- recommended below by the
23 Magistrate Judge even prior to the time that you had ruled
24 on the issues of sovereign immunity, and you eventually
25 ruled on the sovereign immunity and accepted the

1 recommendation as to default, as of that moment, the
2 willfulness of the Defendants was not as culpable as it
3 might otherwise have been.

4 And let me rush to say, Your Honor, I'm not
5 suggesting that the Defendants would not have defaulted in
6 light of subsequent events. The Defendants defaulted in
7 other cases, even after you reached your decision as to
8 sovereign immunity, that the Palestinian Authority is not
9 sovereign.

10 But the law does say that you ought to look at the
11 consciousness of the Defendants as of the time of the
12 default, as of that very moment, the Defendants' culpability
13 in regard to the procedural history of this case, and the
14 entry of the default is not what it is sometimes portrayed
15 to be by the Plaintiffs.

16 The real question as to the culpability of the
17 Defendants in that regard goes, I think, more to the timing
18 of the raising of the motion to vacate the default, as
19 opposed to what the mental state was at that moment.

20 Having admitted that it would be within the ambit
21 of your discretion to say that the default was willful, the
22 next question that's raised by the Plaintiffs is they
23 suggest that, therefore, that ends the inquiry, that this
24 Court may not, in the exercise of its discretion,
25 nonetheless, consider the other factors relevant to a motion

1 to vacate under Rule 60(b). As to that, we disagree with
2 the Plaintiffs. And, in fact, I think the First Circuit has
3 indicated that it does not agree with the Plaintiffs.

4 The case law of this jurisdiction recognizes that,
5 ordinarily, and I quote, "Willfulness is, by itself,
6 dispositive." But by the very use of the word ordinarily,
7 the First Circuit has allowed for a situation that would be
8 extraordinary.

9 The Plaintiffs have argued before you that there's
10 an entire series of cases and Supreme Court holdings that
11 establish beyond any doubt whatsoever that willfulness alone
12 ends the inquiry.

13 That cannot be so, as we have referred the Court to
14 many cases where trial courts and appellate courts have
15 found willfulness but then, nonetheless, vacated
16 a default.

17 Indeed, the case upon which the Plaintiffs rely
18 most strongly for the notion that you ought not even
19 consider anything after a finding of willfulness is out of
20 the 11th Circuit, and subsequent to that, they decided the
21 Jackson case, upon which we have argued at some length in
22 our pleadings, where the Court found a willful default but
23 vacated it, nonetheless, as to China.

24 Recently, another Federal Judge, in the Knox case--
25 and the Knox case is another case against the Defendants for

1 similar allegations in the Southern District of New York,
2 and, on occasion, in your rulings in this case, you've noted
3 similar rulings made by the Court in the Knox case.

4 Recently, Judge Marrero, in the Knox case, had to
5 address the very question, is a willful default, by itself,
6 an inquiry-ender, and concluded, in vacating a default
7 judgment entered against the same Defendants as are before
8 you today, that willfulness was not an inquiry-ender and
9 went on to consider the extraordinary circumstances and the
10 meritorious defenses in that case in ordering the vacator of
11 a default judgment of \$192 million.

12 We would suggest to the Court that the inquiry by
13 Judge Marrero, which I realize is not binding on you as a
14 fellow United States District Court Judge in another
15 jurisdiction, it is, hopefully, somewhat persuasive to you
16 but certainly doesn't control the exercise of your
17 discretion, but we think the analysis that is laid out there
18 as to this legal point is the correct analysis. All of this
19 is simply to say that it is within your discretion to
20 consider the meritorious defenses and the extraordinary
21 circumstances presented in this case.

22 The Plaintiffs have also argued, Your Honor, that
23 we are precluded from raising this motion by virtue of the
24 prior litigation in this Court and in the First Circuit.
25 They have argued that, in essence, prior rulings by you or

1 by the First Circuit preclude the Defendants from arguing a
2 motion to vacate default whatsoever or, in the context of so
3 arguing, raising meritorious defenses. On that point, we,
4 again, disagree with the Plaintiffs on that question of law.
5 There was not before the First Circuit any motion to vacate
6 a judgment.

7 Judge Marrero addressed the same argument raised in
8 the same way in his recent opinion and noted that the
9 appellate, in that instance, terminated appellate litigation
10 in the Second Circuit, had not involved a motion to vacate,
11 that it would have been inapposite to raise the issues on
12 that appeal that were raised by the motion to vacate.

13 Similarly, the issue of whether or not we have a
14 meritorious defense was not litigated before the First
15 Circuit. The question of whether or not you ought to vacate
16 this default judgment was not litigated before the First
17 Circuit. And your discretion is not circumscribed
18 whatsoever in that regard in addressing this motion by the
19 First Circuit opinion, given that we are not raising any
20 issues in our motion that were litigated before the First
21 Circuit.

22 The arguments by the Defendants before the First
23 Circuit dealt with sovereign immunity. We're not claiming
24 we're sovereign. It dealt with whether or not the amount of
25 the judgment created a political question under the

1 Political Question Doctrine. We're not arguing that it
2 does. They argued that you should not have entered default
3 judgment prior to ruling upon sovereign immunity. We're
4 certainly not arguing that point again here. In short, the
5 efforts to preclude us from raising these arguments and
6 these defenses fall short.

7 What I would suggest, Your Honor, therefore, is
8 that the Court does need to reach the other factors under
9 Rule 60(b)(6) in addressing this motion. And I'd like to
10 move on to those other factors after first referencing in a
11 slightly more extended way the recent Knox opinion, with
12 which I assume that the Court is familiar. We brought it to
13 the Court's attention last week, if the Court had not
14 already, in its research, been made aware of it.

15 The Knox opinion addresses several points that are
16 relevant here. The first I've mentioned, Is willfulness
17 dispositive? No. Is litigation precluded? Also previously
18 addressed. No. The question of the importance of merits
19 litigation in a situation such as this is discussed
20 extensively there. The question of prejudice in connection
21 with the granting of a motion is discussed there. And the
22 exceptional circumstances and the importance of foreign
23 policy issues are all discussed there.

24 And the Court addressed those, even in the face of
25 the United States not filing a formal suggestion of interest

1 in that case. They filed a letter with the Court expressing
2 concern about the judgments and their potential impact on
3 the viability of our client's continuing governance, but
4 they did not file a formal suggestion of interest.

5 In his opinion, Judge Marrero noted the-- on the
6 issue of prejudice, I want to turn to that because the
7 Plaintiffs there argued that, because the Gaza Strip has
8 been taken over by HAMAS, that they were prejudiced in their
9 ability to defend the case, arguments that are similar to
10 the ones that are raised before you now. We would suggest
11 that careful analysis by this Court of those arguments would
12 yield a result similar to that taken by Judge Marrero in the
13 Knox case. So we recommend it to the Court, while we
14 recognize that it is certainly not binding on you.

15 Your Honor, I'd like to turn, if I may, to the
16 meritorious defenses that we have raised here, that the
17 Plaintiffs have suggested do not warrant relief here and,
18 after that, address what we believe are the additional
19 extraordinary circumstances.

20 This is a case-- and the parties agree on a very
21 few things in this case, but they agree that the killings
22 here were committed by HAMAS terrorists. The parties agree
23 there's a judgment against HAMAS for their actions issued by
24 this Court for \$116 million. The parties agree that nothing
25 we're asking you to do affects that judgment for what they

1 did.

2 The parties actually come close to agreeing that
3 HAMAS did that to thwart the peace process in which the
4 Palestinian Authority and the PLO were engaged in 1996.
5 Certainly without regard to whether the Plaintiffs agree
6 with that today, in connection with parallel litigation in
7 the District of Columbia, they have presented extensive
8 testimony and argued that HAMAS killed the Ungars to stop
9 the peace process in which our clients were then engaged.

10 In fact, the historical record, including records
11 relied on by the Plaintiffs, show that HAMAS engaged in a
12 series of acts of terroristic violence to thwart that peace
13 process. And, sadly, the evidence in the record is they
14 succeeded, that, as a result of their actions, Israel took
15 action to try to stop that activity. A Government was
16 elected in Israel that pulled back from the peace process,
17 and we're now 12 years later getting to about where they
18 were in 1996 in regards to the peace process.

19 HAMAS, according to the Plaintiffs' experts,
20 opposed what the PA and PLO were doing and, according to the
21 testimony from the Plaintiffs' experts in Washington, D.C.,
22 went to Iran because it was the only place they could go to
23 get support for their actions. They went there to stop the
24 Defendants, at that time, from doing what we would like them
25 to do and what their-- the process in which they're engaged

1 today.

2 That action of HAMAS continues to affect the peace
3 process in connection with this judgment that has been
4 entered against our clients. The Palestinian Authority and
5 the PLO paying \$116 million to the very deserving Plaintiffs
6 in this case for their losses will not assist the peace
7 process. It will give HAMAS exactly, in essence, that which
8 they were seeking to do, further destabilizing the PA and
9 the PLO. The unfortunate reality of this case is that the
10 meritorious defense that the PA and the PLO have was not
11 adequately asserted, but it is critical that it be asserted.

12 Judge Marrero, in his opinion, also discussed the
13 importance of issues like this receiving an airing in a
14 public forum, a trial, because of the serious allegations
15 that a governing entity, particularly one with which the
16 United States is engaged in close diplomatic relationships
17 moving towards peace, the allegation that they supported and
18 were aiders and abettors of terrorism is a critical
19 allegation that ought to be tried, if it can be, as opposed
20 to being resolved without the benefit of litigation.

21 The PA and the PLO, as you know-- and this is
22 partly for the benefit of our audience, I guess-- we don't
23 seek to have this default judgment go away and have the PA
24 and PLO walk out of here and not owe a dime or ever have to
25 try this case. What we seek is the opportunity to have the

1 Plaintiffs prove their case and us have the opportunity to
2 defend it.

3 We recognize that our clients did not pursue that
4 adequately. That's why there's a default judgment against
5 them. We recognize that, that litigation behavior that
6 resulted in that is not the fault of the Plaintiffs. It is
7 the responsibility of the Defendants, but there are
8 extenuating circumstances that are relevant to evaluating
9 that, Your Honor.

10 This governing entity, this fledgling governing
11 entity called the Palestinian Authority, does not have all
12 the infrastructure of the governments of which we're
13 familiar and maybe the governments of which so many others
14 are familiar. It has been in a position of not achieving as
15 much of an organizational structure as other governments.
16 It does not-- has not responded well to foreign litigation.
17 It is not surprising that, at least at some point, they were
18 surprised to be brought in to United States Courts for
19 actions that occurred in the Middle East, in Israel, or
20 Palestine or Jerusalem.

21 It is not surprising that, at first, they resisted
22 the idea that, that matter would be brought here. But that
23 is where it was brought, and that is where you ruled it
24 belonged, and that's where the First Circuit ruled that it
25 belonged, and we know that.

1 But the reality that they had initially a failure
2 to contemplate that is also something that you should
3 consider. The fact that they have been in disarray for a
4 period of time is something that you should consider as you
5 evaluate whether they're to be given the opportunity to
6 defend or not. We've supplied information about the
7 problems that, that government has faced, and we've supplied
8 information about the potential impact of this judgment and
9 others to the Court.

10 The Plaintiffs have argued that the impact of this
11 judgment is not great, that it can be paid readily by this
12 entity. They have suggested that the money is readily
13 available, though the Secretary of State of the United
14 States of America says we're tottering on bankruptcy. They
15 have focused on the fact that people have committed to
16 pledge money as if the money has been received. They have
17 spoken about the Palestinian Authority and the PLO to
18 suggest that somehow this was a willful failure to bring the
19 defense to the attention of the Court in a timely manner.

20 And I would suggest to the Court that-- and the
21 Court is a sophisticated Court-- that it's a very-- as you
22 stand here-- as I stand here before you to argue on behalf
23 of the PLO and the Palestinian Authority, that HAMAS
24 committed the act of terror for which we're held liable now.
25 It is, obviously, something that is politically, itself,

1 charged for our clients.

2 HAMAS is trying, according to what the United
3 States of America and its diplomatic communications says, is
4 trying to thwart our client and the Government from the
5 peace process. They are threatening the very
6 representatives that are speaking for peace.

7 In that context, to bring to the United States
8 Court and try those issues and to expect this kind of
9 governing entity, this kind of fledgling governing entity,
10 to just walk in to Court and present those defenses asks an
11 awful lot.

12 HAMAS does kill people and did kill these people.
13 I'm going to present, if I have the chance, the defense that
14 they killed the Ungars without involvement of my clients,
15 but that is a complicated and difficult defense that is not
16 just raised as if it's a-- some contract dispute. This is
17 an extraordinary case, if ever there was one. It cries out
18 for an extraordinary response by this Court to the motion to
19 vacate.

20 I recognize that, that will require us to try the
21 case. I emphasize that it doesn't free HAMAS for its
22 responsibility and the judgment against HAMAS. And I point
23 out that, as judgment is collected against the Palestinian
24 Authority, it is reduced against HAMAS. They will get away
25 scot-free if the Palestinian Authority pays this judgment.

1 Every million dollars that we pay is a million dollars they
2 don't have to pay.

3 So where we are, 12 years after this terrible
4 event, is HAMAS committed the act to thwart the peace
5 process, succeeded in doing so, and now the enforcement of
6 this judgment against our clients has the capability of
7 letting them win again. In the opinion of the Palestinian
8 Authority and the PLO, it would be much more important and
9 appropriate to try the case.

10 THE COURT: Well, if you have to pay this judgment,
11 don't you have a right of contribution against the HAMAS?

12 MR. ROCHON: We would have a right, under the law,
13 for contribution against HAMAS. It would be difficult for
14 us. It's also difficult for the Plaintiffs. We recognize
15 that. But if there is ever a seizure of funds going to
16 HAMAS by the Israelis, we'll make efforts to interdict those
17 funds, those funds could be given to the Ungars but not if
18 the judgment is extinguished.

19 THE COURT: You have a right to indemnification, if
20 what you say is true, complete indemnification under our
21 law. I don't know what the law is out in Israel, but, under
22 our law, you would have the right to complete
23 indemnification, if what you say is true.

24 MR. ROCHON: If the Court-- an indemnification
25 action, to the degree HAMAS would ever appear in Court to

1 defend it, the argument would be, of course, that we're late
2 for that, as well.

3 THE COURT: A cause of action for indemnification
4 doesn't arise until you've paid, you've paid the judgment.
5 It hasn't accrued it. You pay this judgment, you've got a
6 right of indemnification that accrues at that time.

7 MR. ROCON: Yes.

8 THE COURT: That's the law of here. I don't know
9 what it is elsewhere.

10 MR. ROCHON: It is certainly undeniable that, as to
11 the Plaintiffs' collections against HAMAS, they would end
12 with the payment of the judgment by the PA and the PLO, and
13 that would put the PA and the PLO litigating collection
14 action against HAMAS--

15 THE COURT: That's right.

16 MR. ROCHON: -- which, obviously, poses, in some
17 ways, as many complications and more than any current effort
18 to collect against HAMAS.

19 The reality, Judge, is that the reason that the
20 collection efforts are focused on our clients instead of on
21 HAMAS is because we are perceived to have the money, despite
22 the fact that HAMAS engaged in the action, according to the
23 Plaintiffs, with the assistance of Iran, not with the PA.
24 And Iran was doing that to thwart the peace process. That's
25 also the reality of the case.

1 THE COURT: I don't know about any of those factual
2 assertions.

3 MR. ROCHON: Well, the factual assertions about the
4 Plaintiffs saying that the-- that HAMAS did this with the
5 assistance of Iran are taken from what the Plaintiffs
6 alleged in Washington, D.C. They sued Iran on that theory.

7 So those allegations come from the Plaintiffs, not
8 from me. They also come from me, but they originally come
9 from the Plaintiffs.

10 The suggestion that they did that to thwart the
11 peace process comes from me, but it comes from me quoting
12 the Plaintiffs, that they did that because they couldn't get
13 support from the PA or PLO so they went to Iran comes from
14 the Plaintiffs' expert under oath in Washington, D.C.,
15 Reuvan Paz, and quoted in our brief. Those aren't-- that's
16 not my client making those statements because we'd like it
17 to be so. It's the Plaintiffs making those statements
18 because they believe it to be so, and they'd be admissions.

19 The factual scenario of HAMAS's involvement and
20 responsibility for this comes by full accord. The question
21 in this case is whether or not the Plaintiffs would be able
22 to establish before you that, despite the fact that HAMAS
23 was doing this to thwart the process of peace in which our
24 clients were engaged, that our clients, nonetheless, for
25 some reason, aided and abetted that process and they came to

1 us for aiding and abetting of that process.

2 We would like to suggest to the Court, and we do
3 suggest to the Court, that there is a tension between the
4 theories advanced by the Plaintiffs before this Court and
5 the District of Columbia.

6 THE COURT: There's no question that the-- there
7 are factual issues as to whether the Palestinian Authority
8 and the PLO would be liable in this case if the case were
9 heard on the merits.

10 But that was an opportunity that your clients
11 had a long time ago, to file an answer in this case and
12 dispute these allegations and submit the discovery, and
13 Yasser Arafat did not want to subject himself to a
14 deposition, along with the other six or seven officials that
15 were noted for depositions, and to make discovery.

16 He made a very deliberate choice not to defend
17 this case on the merits and to put all his eggs in one
18 basket, sovereign immunity. He made that decision, and it
19 was reported right here in open Court by his counsel,
20 Ramsey Clark.

21 It's right here in the record, my hearing in
22 September, 2004. I stated, "I advised these Defendants a
23 long time ago that the proper way to raise the defense of
24 sovereign immunity was to file an answer and to raise the
25 affirmative defense of sovereign immunity, and then I would

1 have a hearing on the matter. I would stay discovery until
2 that matter was resolved."

3 Mr. Clark came in to Court and said unequivocally
4 that Yasser Arafat did not want to file an answer in this
5 case and did not want to defend this case on the merits.

6 MR. ROCHON: I certainly agree with your
7 characterization of what Mr. Clark said and that, that was
8 the strategy that, together with their counsel, Mr. Clark,
9 that Mr. Arafat and the Palestinian Authority pursued.

10 That's why we're here on a motion to vacate default
11 judgment. If it weren't for that kind of behavior, we
12 wouldn't have a default judgment. Some of the other cases
13 that we've cited involve Defendants being equally resistant
14 to participating in the U.S. Court process but Courts, in
15 the exercise of their discretion, granting motions to vacate
16 default.

17 It is the case, Your Honor, that the Plaintiffs
18 have suggested that they would be prejudiced from the
19 inability to depose those people at this point. In our
20 response to that, in our briefs, is, first of all, as to
21 many of those individuals, the idea that they had evidence
22 that would have been helpful to the Plaintiffs' case is
23 purely speculative. But then, in addition, if there's a
24 particular circumstance in which they're prejudiced, we can
25 address that by way of conditions in connection with the

1 trial.

2 THE COURT: Arafat is dead. He can't be deposed,
3 and he was the key witness. He could have subjected himself
4 to a deposition and answered truthfully and refuted all
5 these allegations that they were giving safe haven to the
6 HAMAS and was supporting HAMAS and so forth. He could have
7 fought this case, and he chose not to, for whatever reasons.

8 MR. ROCHON: The notion that he's the key witness
9 I'm not as sure about, Your Honor. He could have said that
10 he didn't support it, but the Plaintiffs would say, so it
11 was some other person within the Palestinian Authority or
12 the PLO who did it.

13 I can tell you the contemporaneous record, which is
14 even better than what's speculated about what he might have
15 said or would have said, for me to say what he would have
16 said or Mr. Strachman to say what he would have said, it's
17 uncontested that the Palestinian Authority arrested the--
18 two of the individuals who were involved in this action
19 shortly after it occurred, hardly consistent with desiring
20 it to occur and aiding and abetting it.

21 HAMAS rioted when those individuals were turned
22 over to the Israelis because they said that the very people
23 that the Plaintiffs want to depose, Jibril Rajoub, they
24 accused him of turning these people over to the Israelis for
25 trial, and there was a riot in that regard, again, hardly

1 behavior that's consistent with us wanting this to be
2 brought about.

3 That's as opposed me trying to tell you what
4 Yasser Arafat, who I never met, would have or would not have
5 said. I won't do that. But I can tell you the
6 contemporaneous factual record is that two of the people who
7 killed the Ungars were arrested by my client shortly
8 afterwards. That cries out against what you would normally
9 expect from a government that's accused of sponsoring
10 terror. If we had actively pursued this act, would we have
11 provided the perpetrators to the Israelis?

12 I apologize. I'm not supposed to ask you
13 questions, Your Honor. That was inappropriate. It was a
14 rhetorical question, but it's no--

15 THE COURT: It's all right.

16 MR. ROCHON: -- no way for me to argue to the
17 Court.

18 THE COURT: I'm trying to get to the bottom of
19 this, and what troubles me about this is that I can't think
20 of a more willful, deliberate decision on the part of the
21 President of the Palestinian Authority and the head of the
22 PLO. He made that deliberate decision. He did not want to
23 recognize the authority of this Court. I had decided that I
24 had jurisdiction in this case, and, therefore, it was
25 necessary at that time for the PA and the PLO to file an

1 answer, and they kept saying, "Sovereign immunity," so I
2 told them, "File an answer, claim sovereign immunity. I'll
3 stay any discovery that's outstanding, and I'll decide that
4 issue, then you can make a decision as to where you want to
5 go from there."

6 But he chose this route. So I can't think of a
7 more deliberate, intentional act on his part, with the
8 assistance of his counsel, a former Attorney General of the
9 United States.

10 MR. ROCHON: Your Honor, all I can say in response
11 is that it is the case that foreign governments sometimes do
12 not fully appreciate the importance of these matters. When
13 a foreign government is run by more or less a single person,
14 there is even probably a graver danger that those decisions
15 are reached in a way that is less than satisfactory, that
16 when the new President of the Palestinian Authority wrote to
17 the Secretary of State and asked for guidance in these
18 cases, she recommended working with the U.S. Court system.
19 He initiated the steps that resulted in new counsel entering
20 the case, and we have been working to convey to Courts
21 throughout the country that our client desires to have
22 merits litigation to address these matters.

23 THE COURT: I understand your position, and I will
24 make a determination, write an opinion in this case, make a
25 determination of whether the equities are on your side to

1 have this judgment that's been in effect for more than three
2 and a half years vacated and have a trial on the merits of
3 this case.

4 MR. ROCHON: Yes, sir. Barring anything that I
5 might say in reply, I only had two other things that I wish
6 to say before sitting down.

7 THE COURT: All right.

8 MR. ROCHON: The first is, as we have indicated to
9 the Court, we believe there are significant foreign policy
10 issues here. We're aware the United States did not enter
11 the Knox case. We, nonetheless, encourage you to seek the
12 views of the United States of the foreign policy
13 implications here. This matter's quite a bit different than
14 Knox in terms of the role of HAMAS and the potential impact
15 on the peace process. So we would ask the Court to do that.
16 It's, obviously, another one of your discretionary calls.

17 Secondly, and unrelated, we have pending before you
18 an effort for us to satisfy the judgment in the Bucheit
19 matter, and I did assure Plaintiffs' counsel in that case
20 I'd raise that in my argument with you to ask that in an
21 effort to get that done, and now I've done so.

22 THE COURT: All right.

23 MR. ROCHON: Thank you, sir.

24 MR. STRACHMAN: Good afternoon, Your Honor.

25 Because of the numerous issues here, I'm going to rely, in

1 large measure, on our brief-- briefs. They were fairly
2 extensive and involve a lot of details and citations.

3 What is particularly salient to me here is a few
4 facts that were omitted by the Defendants here. One, they
5 have never represented to Your Honor, in their presentation
6 today or in almost 100 pages of briefing, that they would
7 comply with the judgment of this Court. And, in fact, the--
8 they have never complied with the payment of any judgment
9 that has entered against them.

10 So the Bucheit case, for instance, which is a
11 million dollar judgment that they fully litigated for five--
12 that is five years old, is only now being paid because it
13 was brought to the attention of the Judge in Knox that they
14 were not complying with judgments and yet seeking the equity
15 powers of the Court. I think that speaks volumes.

16 It speaks volumes here that, even now, even after
17 their new attorneys allegedly were hired a year ago, they
18 still haven't paid 20,000-- almost \$20,000 in attorneys'
19 fees that were ordered by Judge Martin almost four years to
20 the day ago.

21 They have not voluntarily made any payment in this
22 case at all. And, in fact, as you know, we have been here
23 for years in post-judgment collection proceedings with
24 Your Honor, a creditor's bill, for instance, that we filed
25 and that they have defended collection actions against us.

1 Your Honor's argument with respect to
2 indemnification is right on the money because, during this
3 litigation and prior to this litigation, HAMAS members were
4 part of the governing coalition of the Palestinian
5 Authority, and we brought all that to the Court's attention.
6 There was a HAMAS minister in the Palestinian government.

7 They operate right now in the West Bank very
8 openly, notoriously, they have banks, institutions, their
9 own schools. The HAMAS is right there, and they could have
10 sought, for the last four years, indemnification from the
11 HAMAS, and they chose not to do that.

12 In fact, as the Court knows, what they did do, and
13 as the Court is aware of this through a parallel proceeding,
14 they have sued the Ungars several times, including in
15 Palestine, including in Rhode Island, including in another
16 Court, another Federal Court. So they have chosen just the
17 opposite.

18 Also, I think what's-- what was missing is an
19 excuse as to where they've been for the last year.
20 Allegedly they're taking instructions now from an economist
21 by the name of Fayyad. Mr. Fayyad was the Finance Minister
22 several years ago. He became the Prime Minister of the
23 Palestinian Authority some time ago.

24 All of a sudden, now he claims that he has the
25 portfolio of dealing with lawsuits. They waited almost a

1 year to file this motion to vacate. And, in fact, as we
2 showed the Court in our exhibits, they strategically planned
3 the filing of this motion after they informed the Court in
4 Israel we were seeking collection actions, or we have a
5 collection action pending, that they were specifically
6 waiting to time this very motion because they were pleading
7 with the State Department to come to their rescue, which, of
8 course, has never happened.

9 The statement that the HAMAS has a separate
10 interest from the PLO is simply inaccurate, and it simply
11 includes a series of misstatements that we pointed out in
12 our brief. Missing in their presentation is the quote from
13 Dr. Paz, where he says the HAMAS gets weapons from the PA.
14 They forget to tell you that. They forget to tell you that
15 HAMAS people are employed by the PA. And, in fact, as we've
16 showed in the exhibits that we filed here, the very leaders
17 of the PA and PLO that we sought to depose have a direct
18 connection with the HAMAS.

19 So, for instance, we asked to depose, and we were
20 ordered, we were allowed to depose Razi Jabali. Well, at
21 the time, he was the head of the PA police force. They
22 don't have an army, so their police force is sort of the
23 highest level of sort of military over there, if you will.
24 They were ordered to produce him for a deposition here.

25 Lo and behold, a couple of years later, after they

1 have waited almost four years-- we're almost now four years
2 since the judgment entered in this case-- Mr. Jabali, as we
3 point out in our brief, is a senior advisor to the leader of
4 HAMAS, protected in Syria. He works for the HAMAS himself,
5 Khaled Mashal. He's his advisor.

6 We asked to depose Mr. Dahlan. We were ordered and
7 granted the right to depose Dahlan, and the Court gave
8 repeated-- Judge Martin gave repeated opportunities and
9 warnings that they had to produce these witnesses.

10 Mr. Dahlan, as we showed to the Court, and we
11 brought a video to the Court in our recent filing, that in
12 January of 20-- in January, 2006, Mr. Dahlan appeared on
13 TV-- we showed the transcript and the actual video-- and
14 where he says, "We sheltered HAMAS people."

15 Now, they misquote the statement, and they would
16 have you believe that it was post the murder of the Ungars.
17 But, in fact, that very statement refers to a master HAMAS
18 terrorist by the name of Yihye Ayash, and Mr. Ayash, of
19 course, they say, "We protected Mr. Ayash." Well, he was
20 killed by the Israelis several months prior to the Ungar
21 murder. So, clearly, Mr. Dahlan admitted, their own
22 employees admitted that they were harboring and they were
23 sheltering HAMAS people.

24 And that brings me to the issue of the prejudice
25 that the Plaintiffs would suffer. The prejudice in this

1 case is overwhelming, and not only is it overwhelming
2 because of time and because of the loss of witnesses, but
3 this Court has already ruled that there would be prejudice
4 to the Plaintiffs. The Court has already said that their
5 actions in defying Judge Martin's orders and your orders
6 with respect to interrogatories, requests for production of
7 documents, requests for admissions, depositions, prejudices
8 our ability to prove our case.

9 Now, they would have us rewind the clock, not just
10 four years, but eight years, going back to March of 2000
11 when we filed this case. Since then, we know that, as
12 Your Honor indicated, the very key witness, the person who
13 himself pulls the strings of terrorism, who all the experts
14 that we showed in our briefs, from the Israeli experts, the
15 academic experts, the State Department, U.S. Congressmen,
16 U.S. Senators, everyone up and down the line, to Secretary
17 of State Rice herself, we showed her statement, all say the
18 same thing, they all say that it was Arafat himself who
19 turned on terrorism when he wanted and turned it off.

20 And what he did was he kept the HAMAS like a caged
21 dog. And he knew they wanted terrorism, and they knew that
22 at some times he wanted terrorism, so he used the HAMAS as a
23 tool, and he opened the cage and unleashed the dog when he
24 wanted an attack. Now, just because the dog wants to attack
25 and the PLO wants to attack doesn't mean they necessarily

1 have the same goals and ideas, but they clearly want an
2 attack, and that's what happened. That's what everybody
3 said straight down the line from the Israelis, the
4 academics, the State Department, Secretary of State Rice.
5 And they don't deny that.

6 What they try to do is selectively quote from
7 statements from Dr. Paz, leaving out the most salient ones,
8 leaving out the statement where he says, "The HAMAS gets
9 guns from the PA," for instance.

10 So now we have-- they would have us be faced in a
11 situation where we don't have Mr. Arafat, we don't have Gaza
12 because all of the PLO and PA documents, their own
13 documents, that are in Gaza were taken over by HAMAS, and
14 they've acknowledged in another case, and we have showed and
15 we provided their brief to Your Honor as an exhibit, where
16 they acknowledge, We can't do discovery in Gaza. All the
17 documents that we had-- now, I'm paraphrasing, but all the
18 documents that we had in our own PA police force, at our own
19 operations in Gaza, are now gone.

20 And we allege repeatedly in our complaint that the
21 support, material support and assistance provided by the PA
22 and the PLO to the HAMAS includes actions that were taken in
23 Gaza. So they would have us handicapped in that respect.
24 They would have us handicapped because Razi Jabali's hiding
25 in Syria with the HAMAS, literally, as an advisor to them.

1 Mr. Dahlan is nowhere to be found.

2 Mr. Al-Hindi, another one of the witnesses that we
3 were allowed to depose and they were ordered to produce and
4 that we allege, like all of the witnesses, was personally
5 involved in providing material support and assistance to the
6 HAMAS. These aren't incidental witnesses. These are the
7 crux of our case. These witnesses were the main witnesses.
8 Lo and behold, Mr. Al-Hindi is no longer a PA employee, so
9 he can't be produced. So the risk to us and the inability
10 to litigate this case on the facts now, eight years after--
11 they'd like to start all over again, like it was the day
12 after we filed the complaint or 21 days after we filed the
13 complaint-- is enormous.

14 Next, Your Honor, is the overwhelming risk that the
15 PA and the PLO will hide their assets. We've shown the
16 Court how they have fought us over \$196,000 in Washington.
17 They have fought us in several places here in the United
18 States regarding larger pots of money. They've fought us
19 over \$11,000 with this judgment, in enforcing this judgment.

20 When Your Honor granted our creditor's bill and
21 transferred to the Ungars the Palestine Investment Fund
22 while their counsel was in the room, while they were
23 present, within 90 days of that, they depleted \$27 million,
24 as we've shown in our brief, in defiance of Your Honor's
25 Court order.

1 Now, they have-- then they also, retroactively and
2 deceptively, tried to amend the Articles of Incorporation.
3 That was the subject of the other suit that was pending in
4 this Court. I believe it was last spring Your Honor
5 dismissed the-- where their purported lawyer sued the
6 Ungars, and we showed in that case that they cooked the
7 books, they cooked the documents, and I don't think it was
8 any of the lawyers' fault. I think they were duped and
9 misled themselves. So they are defying every order of the
10 Court with respect to collection of judgments, as well.

11 And then we have, of course, the \$20,000 that
12 they-- it's less than 20, I think it's like 18, 19,000 they
13 were ordered four years ago to pay for discovery abuses,
14 still hasn't been paid voluntarily. We have collected a
15 small sum. We have had to go places to find assets. They
16 have never voluntarily paid, and they still haven't paid
17 that sum.

18 And, lastly, Your Honor, one of the most
19 significant prejudices that we would suffer is that-- and
20 they fail to acknowledge this, and it's surprising because,
21 as their own website states, the PA is a temporary body, and
22 Your Honor knows as well as anyone else, because you fleshed
23 out all the Oslo Accords and all the documents that created
24 the Palestinian Authority, the Palestinian Authority's legal
25 name is called-- is the interim authority. The Oslo Accords

1 repeatedly refer to it as an interim, temporary body. By
2 its own definition, it should have expired already.

3 In November, there was a conference in Annapolis,
4 and the U.S. Government, the Israeli Government and the
5 Palestinian Authority all committed to creating a
6 Palestinian state by the year-- by the end of this year that
7 would supersede the PA, the PA would evaporate. And that's
8 what they've said on their website. That's what the PA
9 website, as we quoted in our brief, said specifically, that
10 it will no longer exist.

11 So, therefore, a judgment that we might get years
12 from now in this Court would be ephemeral because there
13 would be no ability at all to collect it because the entity
14 that we are suing would go away.

15 And, lastly, with respect to Your Honor's
16 suggestion about or discussion about the strategy that they
17 chose, one thing also missing from the Defendants'
18 presentation is the selectivity that they have chosen with
19 respect to litigation.

20 As this case was going on, exactly at the same time
21 frame that this case was going on, and, in fact, we showed
22 Judge Martin that they were litigating a parallel case in
23 Washington, the Bucheit case in which they brought over
24 witnesses, they had a trial, they appealed, they had
25 separate counsel in Washington.

1 So they decided not just-- they decided
2 specifically, knowing full well that there were certain
3 opportunities that they wanted to exploit to defend cases,
4 but there were others that they decided, for a lot of
5 reasons-- and we know the reasons. One of the reasons is
6 because they would be too embarrassed to bring all this
7 evidence in Court but-- and to submit to depositions and
8 have to answer questions. And, of course, they haven't
9 answered a single question, responded to a single
10 interrogatory, a single request for admission or provided a
11 single document.

12 And glaringly missing from the Defendants'
13 presentation today and in their 100 pages of briefs is the--
14 is all that discovery. They've never provided that
15 discovery. They still haven't provided discovery. And in
16 the last year since, allegedly, this new-- the economist who
17 was appointed to allegedly run their litigation office still
18 hasn't provided any of that discovery or even offered to do
19 any of the discovery that the Court ordered, even if it were
20 permissible.

21 But the point that I was making is that they
22 selectively chose to litigate the Bucheit case and to not
23 litigate this case, and the statements that they made to
24 Your Honor about personally meeting the-- when we look back
25 at the transcript, the decisions of the Court, I think you

1 were, if anything, very generous to them.

2 Mr. Clark stood in Court and said, "I personally
3 met with Yasser Arafat in his office in Ramallah, and he
4 told me what to do." They later submitted a series of
5 letters in this case and in other cases saying, We take this
6 position. It's not a one-off position, it's not a mistake,
7 and it's not deliberate just with respect to this case.
8 It's a global deliberate position that they had with respect
9 to these cases.

10 So, for those reasons and the others that we
11 allege-- that we argue, Your Honor, in our brief, I suggest
12 that there's absolutely no basis for vacating this judgment.
13 Their arguments are offensive not just to the Ungars but to
14 the Court and to our judicial system, and to ask for a redo
15 at this late date is in defiance of virtually all of the
16 First Circuit decisions that we show and that we bring.

17 They are now asking this Court to import and to
18 pretend that we're in New York and look at Second Circuit
19 decisions, some of which were the decisions that the--
20 Judge Marrero in the Knox case decided on, but I guess they
21 didn't realize that we are in the First Circuit, and the
22 First Circuit has very clear decisions with respect to the
23 deliberateness, the issue of deliberateness in default
24 judgments.

25 Thank you.

1 THE COURT: All right. How about freeing up those
2 funds to pay that judgment?

3 MR. STRACHMAN: Your Honor, we had submitted a
4 response and a proposed order agreeing. What we objected to
5 was the nature of the original order and the attempt to sort
6 of undermine Your Honor's restraining order. We submitted a
7 response order, and I know now that the rules suggest we
8 should not be giving orders, but we wanted to give an order
9 because we have no objection if the Court signs our order
10 and those funds are provided to Bucheit. They deserve to be
11 paid, finally.

12 THE COURT: Your proposed order and the proposed
13 order of the Defendants seem to me to be virtually the same.

14 MR. ROCHON: Your Honor, I'll save Mr. Strachman
15 arguing. We don't oppose you signing his instead of ours,
16 if that's what he prefers.

17 THE COURT: All right.

18 MR. ROCHON: Our goal is to accomplish the payment.

19 THE COURT: All right.

20 MR ROCHON: We're not interested in debating the
21 point.

22 THE COURT: All right. I will sign his proposed
23 order.

24 MR. STRACHMAN: Thank you, Your Honor.

25 THE COURT: All right. I'll take this matter under

1 advisement.

2 MR. ROCHON: Your Honor, may I have brief reply
3 or--

4 THE COURT: All right.

5 MR. ROCHON: Thank you, Your Honor.

6 THE COURT: Yes, go ahead. Make it very brief--

7 MR. ROCHON: I will.

8 THE COURT: -- because I've heard about everything
9 I need to hear in this case.

10 MR. ROCHON: Yes, sir. I understand.

11 THE COURT: And I've done all the reading--

12 MR. ROCHON: But, first, and I'll--

13 THE COURT: And I'm going to write an opinion.

14 MR. ROCHON: Thank you. -- I'll go through about
15 five points. The suggestion that there's a separate
16 attorneys' fees judgment in this case, if Mr. Strachman
17 brings it to our attention, we'll try to address it.

18 There was a sanctions order in Knox for attorney
19 misconduct by predecessor counsel. Please let me tell you,
20 that's been paid. If Mr. Strachman brings something
21 involving attorney conduct, we will make arrangements for
22 that to be satisfied.

23 Second, the suggestion of where we have been for
24 the last year, we got in this case in May. We knew when we
25 filed vacator motions they would be read extremely carefully

1 by very capable counsel, and we didn't rush in-- these are
2 complicated matters. There's 12 different cases that we had
3 to analyze and file these motions in. The fact that it took
4 us six and a half to seven months to get them all in, after
5 we were fully engaged, you know, it was an extraordinary
6 effort that we had to file these motions in.

7 On Mr. Paz's testimony about where these people get
8 their guns, I object to counsel's reference, and let me
9 bring the transcript up because the suggestion that we're
10 playing fast and loose with the facts, Mr. Paz was asked by
11 Mr. Strachman in the United States District Court for the
12 District of Columbia where the terrorists in this case got
13 their guns.

14 And on Page 78 of the transcript that we provided
15 as Exhibit M, he, Mr. Strachman, elicited the testimony that
16 the guns in this case were provided by Talachmeh, not from
17 the Palestinian Authority, a HAMAS figure who trained the
18 shooters who killed the Ungars.

19 Later in that man's testimony, he asked,
20 Generally, where does HAMAS get the guns, not as to this
21 incident, but just in general? And he said they'd get them
22 from a variety of places and suggested they get them from
23 the PA, not because they're given; they steal guns. And
24 that's at Page 80, same transcript.

25 As far as the First Circuit standards, Paul Revere

1 is the case that says that, ordinarily, willfulness is not
2 dispositive. It's a-- I'm familiar with what Circuit I'm
3 in. The Courts of this Circuit recognize that, ordinarily,
4 willfulness is not dispositive. The Plaintiffs' counsel
5 cited as many Second Circuit and 11th circuit cases as we
6 have.

7 On the question of-- there was one other record
8 reference I wanted to bring to your attention, Your Honor.
9 The notion that our client is working secretly with HAMAS in
10 1996, that we're-- that they're a dog and we're a dog owner
11 is all very colorful, but I'd suggest that the Court refer
12 to the people who actually established the foreign policy
13 for the United States in these matters, not Mr. Strachman,
14 but the Department of State, which said, and I quote, "The
15 Palestinian Authority"-- and this is on Page 27 of our
16 original motion-- "The Palestinian Authority, which is
17 responsible for security in the Gaza Strip and most
18 West Bank towns continued, in 1996, its effort to reign in
19 Palestinian violence aimed at undermining the peace
20 process."

21 The fact that sometimes the dog of HAMAS was not
22 controllable doesn't mean that we wanted it to be out of
23 control. The State Department decides these issues, not the
24 kind of representations from Congressmen on the floor of the
25 House trying to, you know, get some votes from their

1 district for saying something that they think is going to be
2 palatable. Foreign policy and the evaluation of our client
3 comes from the Executive Branch in the State Department, not
4 from Plaintiffs' counsel.

5 We would urge the Court to consider asking the
6 State Department for their views as to whether our clients
7 are dogs working with HAMAS or what is, in fact, the case,
8 face assassination threats for trying to work towards peace.

9 Your Honor, the-- with that, and given what the
10 Court has said, I would only add that, on any discovery,
11 since we've come in the case, we actually are working with
12 Plaintiff, and we've argued with courts in the District of
13 Columbia to have reciprocal discovery in the cases down
14 there. He's opposed it.

15 We were asked to provide documents in this case.
16 We worked with Mr. Strachman in this case to provide
17 documents related to the British gas deal our client is
18 engaged in so that, apparently, he could seek collection
19 efforts in that regard. We, and I now refer to ourselves
20 personally, have done what we can to comply with discovery
21 orders since we've come in the case, and there certainly is
22 no motion to compel discovery before this Court from
23 Mr. Strachman.

24 Your Honor, we would ask the Court to recognize
25 that, in fact, the Palestinian Authority ought to have the

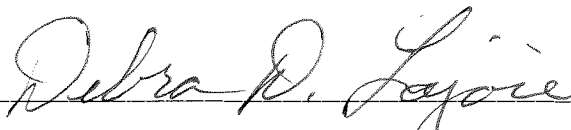
1 day to counter the allegations made by Plaintiffs' counsel
2 regarding our client's behavior. Thank you very much for
3 your patience.

4 THE COURT: All right. Thank you for your
5 arguments. And, as I said, I'll take this matter under
6 advisement, and I'll write yet another opinion in this long
7 case that was filed in the year 2000. We'll take a recess.

8 (The proceeding was concluded at 3:03 p.m.)
9

10 C E R T I F I C A T I O N
11
12

13 I, Debra D. Lajoie, RPR-FCRR-CRI, do hereby
14 certify that the foregoing pages are a true and accurate
15 transcript of my stenographic notes in the above-entitled
16 case.
17

18
19 
20 Debra D. Lajoie, RPR-FCRR-CRI

21
22
23 
24 Date
25